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Mu'min v. Virginia: Reexamining the Need for Content Questioning during Voir Dire in High Profile Criminal Cases

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Note

Mu'min v. Virginia: Reexamining the Need for Content Questioning During Voir Dire in High Profile Criminal Cases

I. Introduction

In *Mu'min v. Virginia*,[1] the United States Supreme Court, in a five to four decision, held that the Constitution does not require that potential jurors be asked questions regarding the content of pretrial publicity during the voir dire[2] in every instance in which the potential jurors have indicated exposure to it.[3] The Court acknowledged that content questioning[4] is preferable in cases where pretrial publicity presents the risk of an unfair trial, but held that it is not constitutionally mandated in all circumstances.[5]

Petitioner Dawud Majid Mu'min had been charged with the murder of a storekeeper.[6] The crime had attracted substantial media attention.[7] News stories had given details not only of the

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1. 111 S. Ct. 1899 (1991).

2. Voir dire literally means "to speak the truth." The phrase describes the preliminary examination that the court or attorneys make of prospective jurors to determine their qualifications and suitability to serve as jurors. BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

3. *Mu'min*, 111 S. Ct. at 1908.

4. Content questioning describes the questioning of potential jurors about the specific contents of news items that they have seen or heard. *Id.* at 1912 (Marshall, J., dissenting).

5. *Mu'min*, 111 S. Ct. at 1908.

6. *Id.* at 1901.

7. *Id.*

crime, but also of Mu'min's previous murder conviction, his prison record, and his confession to the recent murder.[8] Despite the stories' wide circulation, the Supreme Court held that the trial court's failure to probe the content of the potential jurors' exposure to the stories was not violative of Mu'min's constitutional guarantee of a fair trial.[9] The Court, in effect, held that a potential juror who admitted exposure to pretrial publicity could merely assert impartiality and successfully avoid disqualification.[10]

The right to an impartial jury is guaranteed by both the Sixth Amendment,[11] as applied to the states by the Fourteenth Amendment,[12] and by the Due Process Clause of the Fourteenth Amendment.[13] This right is a cornerstone of our jurisprudential system.[14] "The failure to accord an accused a fair hearing violates even the minimal standards of due process."[15] However, the *Mu'min* majority held that content questioning, designed to ensure that right, is not constitutionally mandated.[16] The ruling is troublesome, particularly in light of the fact that previous Court decisions have placed an affirmative burden on an accused wanting a new trial to demonstrate that juror bias existed in the first trial which rendered it unfair.[17] Without content questioning, an accused may not be able to effectively meet the burden of demonstrating juror bias, and his guarantee of a fair trial may be jeopardized.

The *Mu'min* decision marks a step backward in the Court's consistent activism in protecting an accused from the prejudice of adverse pretrial publicity. Until now, the Court espoused a

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8. *Id.*

9. *Id.* at 1908.

10. *See id.*

11. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

12. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

13. The Fourteenth Amendment reads in part "No State shall make or enforce any law . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

14. *See, e.g.*, Ross v. Massachusetts, 414 U.S. 1080, 1081 (1973); *In re* Murchison, 349 U.S. 133, 136 (1955).

15. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

16. *Mu'min*, 111 S. Ct. at 1908.

17. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 723 (1961).

philosophy of affirmative action in dealing with the potential for prejudice caused by pretrial publicity.[18] *Mu'min* signifies a possible return to the Court's previous benign neglect of the problem.[19]

This Note will examine *Mu'min* in light of previous decisions that defined both the right to an impartial jury and the extent of the voir dire necessary to ensure that right. Part II of this Note will examine the history of the right to an impartial jury and the role an adequate voir dire plays in ensuring juror impartiality.[20] Part III.A-D will provide the facts and procedural history of *Mu'min*.[21] Part III.E.1 will discuss the majority and concurring opinions,[22] and Part III.E.2 will discuss the dissenting opinions.[23] Part IV will analyze *Mu'min* by comparing it with previous cases in which the right to an impartial jury was considered.[24] Part V will conclude that while the Court acknowledged an accused's right to an impartial jury, it failed to guarantee a device necessary to ensure this impartiality, and placed the burden of showing actual juror bias on the accused.[25] Therefore, the *Mu'min* decision failed to adequately protect an accused's right to a fair trial before an impartial jury.[26]

II. Background

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a criminal defendant the right to a fair trial by an impartial jury.[27] This guarantee sometimes conflicts with the First Amendment guarantees of free speech and free press.[28] Media accounts of crimes and informa-

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18. Sheldon Portman, *The Defense of Fair Trial from* Sheppard *to* Nebraska Press Association: *Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 416 (1977).

19. *Id.*

20. *See infra* notes 27-184 and accompanying text.

21. *See infra* notes 185-224 and accompanying text.

22. *See infra* notes 225-58 and accompanying text.

23. *See infra* notes 259-97 and accompanying text.

24. *See infra* notes 298-358 and accompanying text.

25. *See infra* notes 359-61 and accompanying text.

26. *Id.*

27. *See supra* notes 11-13 and accompanying text.

28. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

tion about the accused inevitably reach the pool of potential jurors. If inflammatory information reaches this pool, the accused's right to a fair trial is potentially compromised.[29] Despite this risk, there are limitations on the extent to which a court can prevent the media from publishing potentially prejudicial material.[30] This conflict is often referred to as the 'free press — fair trial conflict.'[31]

The potential for prejudice caused by pretrial publicity was recognized as early as 1807.[32] The problem has persisted since that time and has been exacerbated by the advancement of broadcast technology.[33] Prejudicial pretrial publicity has been most evident in so-called "sensational" cases, such as those of Bruno Hauptman[34] and Dr. Sam Sheppard.[35] More recent examples include the cases against General Manuel Noriega,[36] William Kennedy Smith,[37] Mike Tyson,[38] and the Los Angeles police officers accused of beating motorist Rodney King.[39] These cases illustrate the unrelenting growth of the prejudicial pretrial publicity problem. An examination of the Court's decision in *Mu'min* and its effect on the accused's right to a fair trial is therefore timely.

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29. *See Irvin v. Dowd*, 366 U.S. 717, 727 (1961).

30. *E.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976).

31. *See, e.g.*, William H. Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485 (1977).

32. United States v. Burr, 25 F. Cas. 1, 49-52 (C.C.D. Va. 1807) (No. 14692) (recognizing the potential for prejudice caused by adverse pretrial publicity during Aaron Burr's trial for treason).

33. Portman, *supra* note 18, at 395-96.

34. *Id.* at 396. Bruno Hauptman was accused of the kidnapping and murder of the Charles Lindbergh baby. *Id.*

35. Sheppard v. Maxwell, 384 U.S. 333 (1966); *see infra* notes 96-119 and accompanying text.

36. Kevin J. O'Brien, *Can Noriega Receive a Fair Trial?*, N.Y. L.J., Apr. 17, 1990, at 1.

37. Fred Strasser, *No Fair Trial*, NAT'L L.J., Aug. 12, 1991, at 1.

38. *E.g., Tyson Case Judge Won't Gag Lawyers*, N.Y. TIMES, Dec. 26, 1991, at B22; *Down for the Count*, LEGAL TIMES, Sept. 23, 1991, at 3.

39. Lois Timnick, *Lawyers Ask Judge to Move Trial of Officers; King Case: One Says a 'Lynch Mob Atmosphere' Exists. The Publicity Surrounding the Beating of a Black Motorist Makes a Fair Trial Impossible for LAPD Sergeant and Patrolmen, They Contend*, L.A. TIMES, Apr. 23, 1991, at B1.

A. *The Pretrial Publicity Cases*

A review of cases examining the risk to a fair trial caused by pretrial publicity will be helpful to put the *Mu'min* decision in perspective. Supreme Court decisions addressing pretrial publicity have recognized that such publicity may be so pervasive, or so prejudicial, as to deprive an accused of a fair trial.[40] For instance, in *Irvin v. Dowd*,[41] the Court was faced with the issue of whether the high level of adverse pretrial publicity surrounding the petitioner's trial deprived him of a fair trial.[42] The *Irvin* Court held that the extreme level of adverse publicity caused the whole community to be presumed biased and therefore disqualified from jury service.[43]

The trial court had conducted an extensive voir dire that exposed substantial community bias against the petitioner.[44] Of the twelve jurors ultimately selected for the *Irvin* jury, eight had previously formed an opinion that the petitioner was guilty,[45] but each said he could set aside his opinion and render an impartial verdict.[46] Irvin was convicted of murder and sentenced to death.[47] The Supreme Court reversed Irvin's conviction holding that the level of adverse publicity rendered the whole commu-

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40. *See, e.g., infra* notes 41-141, and accompanying text.

41. 366 U.S. 717 (1961).

42. *Id.* at 719-20.

43. *Id.* at 727-28. Media accounts of the murder were substantial and included not only the facts surrounding it, but also included reports that the petitioner had confessed to the murder. *Id.* at 725. The accounts also contained information about Irvin's background, his juvenile crimes, his previous convictions for burglary and arson, and his court martial. *Id.* The press also announced that Irvin failed a lie detector test and that he offered to plead guilty in return for a 99 year sentence. *Id.* at 725-26.

44. *Id.* at 727. The trial court examined 430 potential jurors; 268 were excused for cause because they held fixed opinions regarding the petitioner's guilt, and 103 were excused because of their conscientious objection to imposing the death penalty. *Id.* In addition, the petitioner used all of his peremptory challenges to have 20 more jurors removed, and the state used all 10 of its peremptory challenges. *Id.* Of the 430 potential jurors, 370 admitted having formed some opinion as to the petitioner's guilt. *Id.* The Supreme Court later described the voir dire as revealing a "pattern of deep and bitter prejudice." *Id.* Despite the extensive voir dire and the evident community bias, the trial court denied Irvin's three motions for a change of venue, as well as his eight motions for a continuance. *Id.* at 720.

45. *Id.* at 727.

46. *Id.* at 728.

47. *Id.* at 718. Six murders in and around Evansville, Indiana, were attributed to the petitioner. *Id.* at 719.

nity biased and thus ineligible for jury service.[48] The Court held that the trial court's finding of impartiality simply did not meet constitutional standards.[49] The Court reasoned that the right to a fair trial guarantees an accused the right to a trial before an impartial and indifferent jury,[50] which had not occurred. The *Irvin* Court, however, did not mandate that all jurors be totally ignorant of the facts.[51] Instead, the Court ruled that mere exposure to pretrial publicity should not disqualify a potential juror as long as he could discard his impressions or opinions and render a verdict based solely on the evidence developed at trial.[52] "The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of [an accused's] life or liberty without due process of law.' "[53] According to the Court, the rule would deprive an accused of due process if a juror was seated based only on his assurance of impartiality when he, in fact, held an opinion that would raise the presumption of partiality.[54]

The determination of juror impartiality is a mixed question of law and fact.[55] The Court described the test for determining when an acceptance of the juror's assurance of impartiality would be a denial of due process as "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality."[56] In *Irvin*, the Supreme Court held that the trial court's findings of impartiality violated the accused's due process rights:[57]

> With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a

48. *Id.* at 727-28.

49. *Id.* at 728.

50. *Id.* at 722. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Id.*

51. *Id.*

52. *Id.* at 723.

53. *Id.* (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

54. *Id.* at 724.

55. *Id.*

56. *Id.* at 723.

57. *Id.* at 728.

belief in his guilt.[58]

The *Irvin* Court concluded by acknowledging that under certain circumstances, a mere declaration of impartiality is insufficient because extensive publicity may lead to the presumption that the whole community is biased.[59] The extensive publicity surrounding Irvin's arrest warranted such a presumption.[60]

Irvin is also notable for the extent of the voir dire used to establish that the proceedings were unfair. The record of the trial court's extensive voir dire[61] was instrumental in assisting the Supreme Court's review of the trial court's legal findings of impartiality.[62] This voir dire afforded the petitioner the opportunity to demonstrate the existence of disqualifying juror bias.

The Supreme Court has also held that the very nature of the pretrial publicity may warrant per se juror disqualification. In *Rideau v. Louisiana*,[63] the Court was presented with a case in which a petitioner's detailed confession[64] was broadcast on television three times before his trial[65] and was seen by three members of the jury that convicted him.[66] Despite this, the petitioner's challenges for cause of these jurors as well as his request for a change of venue were denied.[67]

The Supreme Court held that the trial court's refusal to grant the motion for a change of venue denied the petitioner due process of law.[68] The Court held that potential jurors who saw the taped confession could not be impartial.[69] Reasoning that

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58. *Id.*

59. *Id.* at 727-28.

60. *Id.* at 728.

61. *Id.* at 720.

62. *See generally id.* at 727.

63. 373 U.S. 723 (1963).

64. The petitioner was charged with armed robbery, kidnapping and murder. *Id.* at 724. After his arrest, local authorities elicited a filmed confession from the petitioner. *Id.* at 725. The taped confession showed Rideau surrounded by police officers and being asked leading questions by the sheriff. *Id.* Rideau had no lawyer and may not have been aware of what was transpiring. *Id.*

65. The confession was broadcast on television three times in the Calcasieu Parish of Louisiana. *Id.* Of the 150,000 parish residents, a minimum of 53,000 saw a broadcast of the confession. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 726.

69. "[T]he conclusion cannot be avoided that this spectacle, to the tens of

the community had been inundated with highly prejudicial and disqualifying information, the Court stated that a trial held in the community would be "but a hollow formality."[70] Due process required that Rideau's trial be held in a community that had not been exposed to Rideau's confession.[71] A decade later, in *Murphy v. Florida*,[72] the Supreme Court affirmed a conviction in which it had to consider whether a juror's declaration of impartiality was dispositive.[73] The petitioner claimed that his trial for assault and breaking and entering had been tainted by extensive media coverage concerning his lifestyle and criminal history.[74] The eight jurors had claimed they could be impartial, despite the fact that some knew of the petitioner's past crimes.[75]

The *Murphy* Court held that juror assurances of impartiality were not dispositive.[76] Furthermore, the burden of demonstrating the existence of a disqualifying bias was found to rest with the petitioner.[77] Upon review of the voir dire, the Court found that no indicia of juror partiality had existed in the selected jurors.[78] The Court distinguished *Murphy* from *Irvin* and *Rideau*,[79] noting that the atmosphere in the *Murphy* community had not been sufficiently inflammatory to raise a presumption of community partiality.[80]

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thousands of people who saw and heard it, in a real sense was Rideau's trial — at which he pleaded guilty to murder." *Id.* (emphasis omitted). "The kangaroo court proceedings in this case involved a . . . real deprivation of due process of law." *Id.*

70. *Id.*

71. *Id.* at 727.

72. 421 U.S. 794 (1975).

73. *Id.* at 797.

74. The petitioner had gained notoriety for his part in the 1964 theft of the Star of India sapphire. *Id.* at 795. He was also the subject of continuing press interest because of his flamboyant lifestyle. *Id.* In addition, while awaiting trial on the burglary and assault charges, he was convicted of murder and was indicted for conspiracy to transport stolen securities, both of which drew extensive media coverage. *Id.* at 796.

75. The eight jurors chosen were selected from a panel of 78. Of these 78, 30 were excused for personal reasons, 20 were peremptorily challenged, and 20 were excused for cause because they had prejudged the petitioner. *Id.*

76. *Id.* at 800.

77. *Id.*

78. *Id.* at 803.

79. *Id.* at 798-99. The Court also distinguished *Murphy* from Sheppard v. Maxwell, 384 U.S. 333 (1966). *Id. See infra* notes 98-120, and accompanying text.

80. *Murphy*, 421 U.S. at 802.

Most recently in *Patton v. Yount*,[81] the Court reviewed the effect of publicity on the fairness of a murder retrial. The petitioner had been convicted and sentenced to life imprisonment.[82] The conviction was subsequently overturned and the case was remanded for a new trial.[83] The retrial was held four years after the first,[84] and again the petitioner was convicted.[85] On appeal, the Court of Appeals for the Third Circuit set aside the retrial verdict after finding that adverse pretrial publicity surrounding the retrial deprived the petitioner of a fair trial.[86]

The Supreme Court reversed and reinstated the conviction,[87] holding that the relevant inquiry must be whether the juror held an opinion that would render him unable to deliver an impartial verdict.[88] The Court was convinced that the retrial's extensive voir dire had provided adequate support for the trial court's finding of impartiality.[89] In addition, the Court found that the level and effect of the publicity was insufficient to disqualify the community as a whole.[90] Moreover, the passage of time between the trials had negated much of the pretrial publicity's effect.[91]

Of particular significance in *Patton* is the extent of the retrial voir dire,[92] and its usefulness not only in rooting out bias,

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81. 467 U.S. 1025 (1984).

82. The petitioner, a math teacher, was convicted by a Pennsylvania state court after confessing to the murder of an eighteen year old high school student. *Id.* at 1027.

83. The conviction was overturned because Yount had inadequate notice of his right to an attorney prior to his confession. *Id.*

84. *Id.* at 1032. At the retrial, the trial court conducted an extensive voir dire lasting 10 days, during which 292 veniremen were examined. *Id.* at 1027. The petitioner was again convicted of first degree murder. His petition for a writ of habeas corpus was denied by a federal district court. *Id.* at 1028.

85. *Id.*

86. *Id.* at 1029. The circuit court believed that because 77 percent of the potential jurors examined had indicated exposure to pretrial information, the assurances of impartiality made by the jurors eventually seated should not have been believed. *Id.* at 1029-30.

87. *Id.* at 1040.

88. *Id.* at 1035. "[D]id a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality . . . [be] believed?" *Id.* at 1036.

89. *Id.* at 1038.

90. *Id.* at 1033.

91. *Id.*

92. *Id.* at 1034 n.10.

but also in providing a solid foundation for appellate review.[93] The Court recognized that voir dire is an effective tool for identifying bias.[94] The Court closely reviewed the voir dire testimony[95] before according deference to the trial court's finding of impartiality.[96]

B. *Affirmative Action*

Until the Supreme Court's decision in *Sheppard v. Maxwell*,[97] the Court had addressed violations of an accused's right to a fair trial due to pretrial publicity by merely reversing the conviction and remanding the case for retrial.[98] In *Sheppard*, the Court not only reversed the conviction, but strongly urged the adoption of judicial procedural devices to combat the prejudice caused by pretrial publicity at its inception.[99]

Sheppard involved the sensational murder trial of Dr. Sam Sheppard.[100] After Sheppard's wife was murdered,[101] media publicity implicated Sheppard and called for his arrest.[102] Once he had been formally charged,[103] the intensity of the media coverage heightened.[104] During the voir dire, eleven of the twelve eventual jurors testified to having learned of the case through the media.[105] At the trial, media representatives flooded the courtroom,[106] and the jurors were not protected from their influ-

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93. *Id.* at 1038.
94. *Id.*
95. *Id.* at 1039.
96. *Id.* at 1038.
97. 384 U.S. 333 (1966).
98. *Id.* at 363.
99. *Id.* at 361-62.
100. Sheppard claimed to have been sleeping in another room when he heard his wife cry out. He ran to her room and saw a "form," with which he struggled until a blow to his head rendered him unconscious. When he regained consciousness, he found his wife dead. He saw the "form" running away and he chased it to the lake where another struggle ensued and he was again knocked unconscious. *Id.* at 336. Sheppard was repeatedly questioned, was asked to take a lie detector test, and was subjected to a coroner's inquest, all without an attorney. *Id.* at 338.
101. Mrs. Sheppard was bludgeoned to death in her bedroom. *Id.* at 335-36.
102. *Id.* at 340-41. The articles also detailed Sheppard's lack of cooperation, his performance at the inquest, and his refusal to take a lie detector test. *Id.*
103. *Id.* at 341.
104. *Id.*
105. *Id.* at 345.
106. *Id.* at 343. Most of the seats in the courtroom were assigned to the media. A

ence during the trial.[107] Sheppard was convicted of murder.[108]

In reviewing the denial of a writ of habeas corpus,[109] the Supreme Court held that Sheppard had been denied a fair trial.[110] The Court began its review by examining and commenting on the role of the press in the context of criminal trials, stating:[111] "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism."[112] The Court, however, cautioned that the media's presence in the criminal justice process can have deleterious effects.[113] The Court noted "the requirement that the jury's verdict be based on evidence received in open court, not from outside sources," assures the fair administration of justice.[114]

In reaching its conclusion,[115] the Court recognized that the trial court's failure to protect Sheppard against the influence of pretrial publicity alone did not constitute a deprivation of due process.[116] However, the pretrial publicity in conjunction with the conditions at trial did amount to a violation of due process.[117] Specifically, the trial court had failed to utilize procedures designed to insulate jurors from outside influence once the

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large table set up inside the bar accommodated even more media personnel. *Id.* The media conducted live broadcasts from the courthouse. *Id.* In addition, daily testimony of the witnesses was printed verbatim in local newspapers. *Id.* at 344.

107. *Id.* at 347.

108. *Id.* at 335.

109. A writ of habeas corpus or *habeas corpus ad subjiciendum* is a writ commanding the person detaining a prisoner to produce the body of the petitioner. BLACK'S LAW DICTIONARY 709-10 (6th ed. 1990). "[T]he purpose of [the writ] is to test the legality of the detention or imprisonment; not whether he is guilty or innocent." The availability of the writ is guaranteed by Article I, § 9 of the Constitution. *Id.*

110. *Sheppard*, 384 U.S. at 354-55.

111. In addition, the Court stated: "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Id.* at 349 (quoting *In re* Oliver, 333 U.S. 257, 268 (1948)). "A responsible press has always been considered as the handmaiden of effective judicial administration, especially in the criminal field." *Id.* at 350.

112. *Id.*

113. *Id.* "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Id.* (quoting Bridges v. California, 314 U.S. 252, 271 (1941)).

114. *Id.* at 350-51.

115. *Id.* at 363.

116. *Id.* at 354.

117. *Id.* at 355, 362.

trial began.[118]

The Court in *Sheppard* issued a stern warning about the dangers of pretrial publicity in a criminal proceeding:

> [U]nfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the *trial courts must take strong measures to ensure that the balance is never weighed against the accused.*[119]

The *Sheppard* Court put the onus on the trial court because its own power is limited to reversing convictions obtained through unfair trials; such power is inadequate to solve the pretrial publicity problem.[120] "[T]he cure lies in those remedial measures that will prevent prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[121]

In reversing and remanding the case, the *Sheppard* Court promulgated a doctrine of increased judicial activism in preventing the possibility of prejudice at its inception.[122] This act is considered to have been the birth of affirmative action in preventing pretrial publicity from infecting a criminal trial.[123]

A decade later, this pronouncement was reinforced. In *Nebraska Press Ass'n v. Stuart*,[124] the Court, in striking down the trial court's imposition of restrictions on press accounts,[125] again recommended procedural safeguards to protect the accused's

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118. *Id.* at 358. Procedures that could have ensured a fair trial include assigning the trial judge control of the use of the courtroom and the courthouse by media personnel. *Id.* The court could have insulated witnesses from outside influences. *Id.* at 359. The trial judge could have made efforts to control the release of information. *Id.* In particular, the court could have warned the media to check the accuracy of its stories, and the judge could have prevented the lawyers, the police, and the coroner from revealing certain information. *Id.* at 360.

119. *Id.* at 362 (emphasis added).

120. *Id.* at 363.

121. *Id.*

122. *Id.*

123. Portman, *supra* note 18, at 405.

124. 427 U.S. 539 (1976).

125. *Id.* at 570.

right to a fair trial.[126] *Nebraska Press* arose after a trial court imposed prior restraint[127] on speech to combat the effects of adverse pretrial publicity.[128] The defendant was charged with murder,[129] and the crime had drawn substantial media attention both locally and nationally.[130]

Responding to requests by both parties, the trial judge entered a restrictive order pertaining to media coverage before and during the trial.[131] The Nebraska Supreme Court modified the order,[132] prohibiting reports of any confession, or any other information "strongly implicative" of the accused.[133]

The Supreme Court refused to uphold the use of prior restraint on speech in *Nebraska Press*,[134] noting that prior restraint on speech is the "most serious and least tolerable infringement on First Amendment rights."[135] However, the Court concluded that devices other than a restraining order might have

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126. *Id.* at 563-64.

127. "A system of 'prior restraint' is any scheme which gives public officials the power to deny use of a forum in advance of its actual expression." BLACK'S LAW DICTIONARY 1194 (6th ed. 1990). In *Nebraska Press*, the prior restraint on speech limited what the press could publish about the case and trial. *Nebraska Press*, 427 U.S. at 542. Prior restraint on speech is also known as a "gag" order. Portman, *supra* note 18, at 409.

128. *Nebraska Press*, 427 U.S. at 543.

129. *Id.* at 542. Irwin Charles Simants was charged with murdering the six members of the Kellie family in the small town of Sutherland, Nebraska. *Id.*

130. *Id.*

131. *Id.* at 543. The restrictive order, which applied only until the jury was impaneled, prohibited members of the press from reporting on five subject areas: the contents of Simants' confession, the nature of Simants' statements to others, the contents of the note Simants wrote the night of the crime, aspects of the medical testimony, and the identity of the victims of the alleged sexual assault. *Id.* at 543-44. Disclosure of the nature of the order itself was also prohibited. *Id.* at 544.

132. *Id.* at 545.

133. *Id.*

134. *Id.* at 570.

135. *Id.* at 559. While First Amendment rights are not absolute, there is a presumption against prior restraints on those rights. *Id.* at 570. In this case, the presumption of invalidity of the restraining order was not overcome. *Id.*

The Court reviewed the following factors to determine whether the media restraining order was supportable. Those factors were: the nature and extent of pretrial news coverage, the likelihood that other measures would mitigate the harm caused by unrestrained pretrial publicity, and the effectiveness of a restraining order in protecting the accused. *Id.* at 562. The Court affirmed the trial court's determination that adverse pretrial publicity existed which might have affected the accused's right to a fair trial. *Id.* at 563.

adequately protected the accused.[136] It went on to list five devices that could be used to protect an accused from a trial infected by outside influences:[137] change of venue; postponement of the trial; *extensive questioning of the prospective jurors to weed out those with fixed opinions*; emphatic jury instructions on the duty to decide the issues solely on evidence presented at trial; and jury sequestration.[138]

The *Nebraska Press* Court determined that the heavy burden needed to justify the prior restraint was not met because there was no indication that one of the less restrictive alternatives to prior restraint would not have worked.[139] The Court also found it significant that prior Court decisions reversing state court convictions have held that the use of less restrictive devices would have made a critical difference in assuring the accused a fair trial.[140]

The preceding cases identify the relation of pretrial publicity to the constitutional guarantee of a fair trial and illustrate recurring themes. First, voir dire is an effective device for identifying juror bias. The trial courts in *Irvin*, *Murphy*, and *Patton* utilized an extensive voir dire to assess potential juror bias.[141] In addition, in both *Sheppard* and *Nebraska Press*, the Supreme Court urged the use of voir dire to weed out bias at its inception and thereby aid in securing a fair trial.[142] Second, voir dire testimony is crucial for appellate review of a case.[143] An extensive voir dire provides an adequate record of the trial court's findings of impartiality and allows for a review of such findings as a matter of law. For instance, in *Irvin*, reviewing the voir dire led to the presumption that the whole community was biased.[144] Third, reversing convictions obtained through unfair trials is insuffi-

136. *Id.* at 565. In addition, the Court found it significant that there was no assurance that the prior restraint on publication would have worked. *Id.* at 569.

137. *Id.* at 563-64.

138. *Id.*

139. *Id.* at 565.

140. *Id.* at 569 (citing Sheppard v. Maxwell, 384 U.S. 333, 363 (1966), Rideau v. Louisiana, 373 U.S. 723, 726 (1963) and Irvin v. Dowd, 366 U.S. 717, 728 (1961)).

141. *See supra* notes 44, 78, 89 and accompanying text.

142. *See supra* notes 121, 137, 138 and accompanying text.

143. *See generally* Patton v. Yount, 467 U.S. 1025 (1984); Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, 366 U.S. 717 (1961).

144. *See supra* notes 60-61 and accompanying text.

cient; trial courts should take affirmative action to protect the accused from prejudice at its inception.[145] An extensive, probing voir dire is a procedural device that allows the trial courts to satisfy the Supreme Court's edict.[146] Lastly, the voir dire is a procedural device that assists a petitioner in meeting his burden of showing actual prejudice at either the trial or appellate level.

C. *The Racial Bias Analogy*

In addition to deciding cases involving the effect of pretrial publicity on the right to a fair trial, the Supreme Court has also decided several cases involving racial bias and its effect on that right. Such cases have examined the adequacy of the voir dire. These cases reveal that circumstances can exist in which the risk of prejudice adversely affecting a trial mandates an inquiry into racial bias during the voir dire.[147]

For instance, in *Aldridge v. United States*,[148] a case decided under the Supreme Court's supervisory power,[149] the Court reversed a petitioner's murder conviction because the trial court had refused to allow adequate questioning on the subject of racial bias during the voir dire.[150] The petitioner, a black man, had been convicted by an all white jury[151] for the murder of a white police officer.[152] In reaching its conclusion, the Court examined previous decisions and recognized the propriety of asking questions regarding racial bias when the defendant is a minority.[153]

The Court held that the risk of racial prejudice was not so

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145. *See generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Sheppard v. Maxwell, 384 U.S. 333 (1966).

146. *Nebraska Press*, 427 U.S. at 562-64.

147. *See infra* notes 148-84 and accompanying text.

148. 283 U.S. 308 (1931).

149. *Mu'min*, 111 S. Ct. at 1903. The Supreme Court has supervisory power over cases tried in federal courts. *Id.* The Court may reverse a lower court even if the error is not of constitutional magnitude. *Id.* at 1904.

150. *Aldridge*, 283 U.S. at 315. During jury selection, the trial court refused the petitioner's request that the potential jurors be questioned on the existence of racial bias. *Id.* at 310.

151. *Id.* at 310.

152. *Id.* at 309.

153. *Id.* at 313. The Court concluded "[t]he right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." *Id.*

remote as to justify the trial court's refusal to allow questioning on the subject.[154] The Court concluded by stating:

> [w]e think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.[155]

The Supreme Court has also relied on constitutional grounds to overturn convictions because of the failure to question on racial bias during the voir dire. For instance, in *Ham v. South Carolina*,[156] a case tried in a state court,[157] the trial court refused to allow petitioner's counsel to question potential jurors on racial bias despite the fact that the petitioner was a black civil rights worker.[158] The Court held this refusal violated the essential fairness requirement of the Due Process Clause of the Fourteenth Amendment,[159] and warranted reversal of the conviction.[160] The Court acknowledged that while questions relating to racial bias are constitutionally mandated, the trial court retains discretion over the number and form of the questions.[161]

Despite the *Ham* Court's recognition that failure to ask racial bias questions may violate the Constitution when racial bias threatens trial fairness, the Supreme Court in *Ristaino v. Ross*[162] made it clear that such an inquiry is not required in all interracial cases.[163] In *Ristaino*, the Supreme Court upheld the conviction of a black petitioner for assaulting a white security guard despite the fact that the trial court had refused to allow voir dire

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154. *Id.* at 314.

155. *Id.* at 315.

156. 409 U.S. 524 (1973).

157. *Id.* The petitioner was a young, black civil rights worker who claimed his arrest for marihuana possession was a frame-up by police who were "out to get him." *Id.* at 525.

158. *Id.* In addition to the racial bias questions, the petitioner also requested questions relating to possible prejudice towards bearded men and possible prejudice caused by pretrial publicity. *Id.* at 525-26.

159. *Id.* at 527. Although the Court held that failure to ask racial bias questions violated the petitioners due process rights, the failure to ask questions relating to bias against bearded men and bias caused by pretrial publicity was not a constitutional violation. *Id.* at 527-28.

160. *Id.* at 529.

161. *Id.* at 527.

162. 424 U.S. 589 (1976).

163. *Id.* at 590.

questions regarding possible racial bias.[164] The Court restated its prior holding in *Ham* that questioning of potential jurors about racial prejudice is constitutionally mandated in circumstances that present an impermissible risk to a fair trial.[165] However, in affirming the conviction, the Court distinguished the facts of *Ristaino* from those in *Ham*, and found that the essential fairness requirements of due process did not mandate racial prejudice questioning in *Ristaino*.[166] Although the case involved an interracial crime, unlike *Ham*, racial issues were not "inextricably bound up with the conduct of the trial,"[167] and an inquiry was therefore not constitutionally required.[168]

The *Ristaino* Court did not state expressly what circumstances necessitate a racial bias inquiry during voir dire. However, the Supreme Court in *Turner v. Murray*[169] made it clear that a capital trial ordinarily prompts such an inquiry.[170] *Turner* involved the trial of a black man for the murder of a white jewelry store owner.[171] During the voir dire, the trial judge refused to ask any of the petitioner's proposed questions regarding racial bias.[172] Instead, only general impartiality questions were asked.[173] The jury convicted Turner of murder,[174] and recommended a death sentence,[175] which was subsequently imposed by the trial court.[176]

After reviewing the denial of habeas corpus relief, the Supreme Court vacated Turner's death sentence.[177] The Court ruled that the additional fact that Turner was convicted of a capital crime distinguished it from *Ristaino*, and presented a

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164. *Id.*
165. *Id.* at 595.
166. *Id.* at 595-97.
167. *Id.* at 597.
168. *Id.*
169. 476 U.S. 28 (1986).
170. *Id.* at 33-36. A capital case or crime is "[o]ne in or for which death penalty may, but need not necessarily, be imposed." BLACK'S LAW DICTIONARY 209 (6th ed. 1990).
171. *Turner*, 476 U.S. at 30.
172. *Id.* at 30-31.
173. *Id.* at 31. The judge asked the general impartiality questions before any of the jurors were aware that it was an interracial crime. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 37.

"special circumstance," which mandated the requested inquiry.[178] The Court pronounced a per se rule that a capital defendant charged with an interracial crime is entitled to have questions relating to racial prejudice asked during the voir dire.[179] However, the Court noted that the trial court maintains discretion over the form and number of the questions, and the decision whether to examine jurors collectively or individually.[180] The Court described this rule as "minimally intrusive."[181]

The preceding cases dealing with the extent of voir dire questioning necessary to protect an accused from racial prejudice reveal recurring themes. Questions regarding racial bias are required when a likelihood exists that racial prejudice will pose a substantial risk to the defendant's right to a fair trial.[182] The rule applies not only to racial bias, but also to "other prejudices of a serious character."[183] Furthermore, a capital crime is a special circumstance demanding additional protection.[184]

III. Facts and Procedure

A. *The Crime*

In September 1988, while serving a forty-eight year sentence in a Virginia state prison for a 1973 first-degree murder conviction,[185] Dawud Majid Mu'min was assigned to a work detail supervised by the Virginia Department of Transportation (VDOT).[186] During a lunch break, Mu'min escaped over a fence and walked to a nearby shopping center,[187] where he entered

178. *Id.* at 33. The Court found that the trial judge failed to adequately protect the petitioner's constitutional right to an impartial jury, and concluded that there was an unacceptable risk that racial prejudice may have infected the petitioner's sentencing. *Id.* at 36.

179. *Id.* at 36-37.

180. *Id.* at 37.

181. *Id.*

182. *Id.*

183. Aldridge v. United States, 283 U.S. 308, 313 (1931).

184. *See* Turner v. Murray, 476 U.S. 28, 33 (1986).

185. *Mu'min*, 111 S. Ct. at 1901.

186. *Id.* While assigned to the VDOT, Mu'min used the grinding equipment in the VDOT shop to sharpen a metal spike and attach it to a wooden handle. Brief for Respondent at 2, Mu'min v. Virginia, 111 S. Ct. 1899 (1991) (No. 90-5193).

187. Respondent's Brief at 2, *Mu'min* (No. 90-5193).

Dale City Floors and repeatedly stabbed the store owner Gladys Nopwasky with a sharpened spike he had fashioned earlier.[188] After the attack, Mu'min took four dollars in change and fled the store,[189] returned to wipe off his fingerprints, and again fled.[190] He then discarded the sharpened spike and his bloody shirt and returned to the work detail.[191] A customer discovered Nopwasky partially undressed and lying on the floor.[192] Rescue efforts failed and Nopwasky bled to death.[193] The autopsy revealed that she had been stabbed or cut sixteen times about the face, neck, chest, and arm.[194]

B. *The Publicity*

The crime generated substantial media attention.[195] It received front page coverage not only because of its shocking nature, but because of its similarity to the crimes committed by Willie Horton, the Massachusetts inmate whose crime spree during a weekend furlough became a controversial issue during the 1988 presidential campaign.[196] Press accounts contained substantial information about Mu'min that was not admitted at trial,[197] such as information about his 1973 murder conviction,[198]

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188. *Id.* Mu'min claimed that after he entered the store, a heated argument over prices ensued, during which time Nopwasky screamed at him and called him names. He then slapped her and she kicked him in the groin. As he fell to the floor he pulled down her pants. Nopwasky then attacked him with a knife. He then used the sharpened spike to stab her. Brief for Petitioner at 4, Mu'min v. Virginia, 111 S. Ct. 1899 (1991) (No. 90-5193).

189. Petitioner's Brief at 4, *Mu'min* (No. 90-5193) (Mu'min claimed he took the money and fled the store in order to get help).

190. *Id.* at 2.

191. *Mu'min*, 111 S. Ct. at 1901.

192. Respondent's Brief at 2, *Mu'min* (No. 90-5193).

193. *Id.* at 2-3.

194. *Id.* at 3. In addition, Nopwasky had several blunt force injuries consistent with punches to the face. *Id.*

195. *Mu'min*, 111 S. Ct. at 1901.

196. Willie Horton was a Massachusetts inmate who raped a Maryland woman while on a weekend furlough. That incident sparked a heated controversy during the 1988 Presidential campaign. *See* Engleberg, *Bush, His Disavowed Backers And a Very Potent Attack Ad*, N.Y. TIMES, Nov. 3, 1988, at A1.

197. Petitioner's Brief at 5, *Mu'min* (No. 90-5193).

198. *Id.* at 6-7. The accounts not only related the facts of his murder conviction, but also included editorials on the unavailability of the death penalty at the time of the conviction. *Id.*

his prison record,[199] and his juvenile record.[200] The accounts also indicated that Nopwasky might have been raped.[201] In addition, several accounts indicated Mu'min had confessed to the murder.[202]

C. *The Trial*

Before trial, Mu'min moved for a change of venue,[203] submitting forty-seven newspaper articles to illustrate the extent of the media coverage.[204] The trial judge deferred ruling on the motion until an attempt to seat a jury was made.[205] He also denied Mu'min's request for an individual voir dire and ordered that it be conducted in groups, and then in panels of four if necessary.[206] Mu'min submitted sixty-four proposed voir dire questions.[207] The judge refused to ask any of the proposed questions relating to the content of the information to which the potential jurors had been exposed or the content of any discussions they may have had about the case.[208] The judge allowed only ques-

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199. *Id.* at 5-6. The accounts related that Mu'min was awaiting trial for beating another inmate, that he had 23 other prison rule violations, and that he had been rejected for parole six times. *Id.*

200. *Id.* at 7.

201. *Id.*

202. *Id.* at 8. The news stories about Mu'min's confession made headlines such as "Murderer Confesses to Killing Woman" and "Inmate said to admit killing." *Mu'min*, 111 S. Ct. at 1911 (Marshall, J., dissenting).

203. *Mu'min*, 111 S. Ct. at 1901.

204. *Id.*

205. *Id.* at 1902.

206. *Id.*

207. *Id.*

208. *Id.* The proposed but rejected questions were:

31. Have you acquired any information about this case, from the newspapers, television, conversations or any other source?
32. What have you seen, read or heard about this case?
33. From whom or what did you get this information?
34. When and where did you get this information?
35. Have you discussed this case with anyone?
36. With whom?
37. When and where?
38. What did you discuss?
39. Have you formed an opinion or conclusion about this case?
40. What is it?
41. Has anyone expressed any opinion about this case to you?
42. Who? What? When? Where?

tions on whether the jurors had received information, and if they had, whether it would affect their impartiality.[209]

The trial court began the voir dire by questioning a panel of twenty-six jurors.[210] Sixteen admitted exposure to the publicity,[211] but when asked whether they could remain impartial,[212] only one admitted an inability to do so and was excused for cause.[213] Mu'min's request that all jurors admitting exposure be excused was denied.[214] The court conducted further voir dire in panels of four, again asking jurors whether they had been exposed, and if so, whether they could nonetheless remain impartial.[215] Eight of the twelve jurors ultimately chosen had been exposed to pretrial publicity,[216] but none admitted having formed

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Petitioner's Brief at 10-11, *Mu'min* (No. 90-5193).

209. Petitioner's Brief at 12-13, *Mu'min* (No. 90-5193). The questions allowed by the court were:

> Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or any other source?
> Is there anyone who has acquired any information from the news media or from any other source?

Id. at 12.

If the jurors admitted exposure, the following questions were asked:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
> Considering what the ladies and gentlemen who have answered in the affirmative have heard about this case, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

Id. at 12-13.

210. *Mu'min*, 111 S. Ct. at 1902.

211. *Id.*

212. *See supra* note 209.

213. *Mu'min*, 111 S. Ct. at 1902.

214. Petitioner's Brief at 13-14, *Mu'min* (No. 90-5193).

215. *Mu'min*, 111 S. Ct. at 1903. Several more jurors were excused for a variety of reasons including equivocation as to whether they could remain impartial, bias toward the Islamic faith, and an inability to impose the death penalty. *Id.* In addition, the prosecution and the defense each peremptorily challenged six jurors. *Id.*

216. *Id.*

an opinion.[217] The jury convicted Mu'min and recommended the death penalty.[218] The trial court accepted the jury's recommendation, and sentenced Mu'min to death.[219]

D. *Appeal to the Virginia Supreme Court*

On appeal, the Supreme Court of Virginia, in a four to three decision, rejected Mu'min's contention that the failure to ask the proposed voir dire questions violated his constitutional rights.[220] The majority held that although content questions may be asked, the Constitution does not mandate it.[221] The dissenters argued that failure to ask content questions,[222] combined with the fact that a juror's impartiality could be inferred from his silence, deprived Mu'min of a fair trial.[223] Certiorari was granted by the United States Supreme Court.[224]

E. *The Supreme Court's Decision*

1. *Majority Opinion*

Chief Justice Rehnquist, writing for the majority,[225] began by examining the racial bias cases.[226] The Court first examined cases tried in the federal courts, over which the Supreme Court has supervisory power.[227] The Court examined *Connors v. United States*,[228] *Aldridge v. United States*,[229] and *Rosales-Lopez v. United States*,[230] which had all held that in instances in which racial prejudice presents the risk of an unfair trial, the trial court must conduct voir dire questions designed to cover

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217. *Id.*
218. *Id.*
219. *Id.*
220. Mu'min v. Commonwealth, 389 S.E.2d 886, 893 (Va. 1990).
221. *Id.* at 893.
222. *Id.* at 899 (Whiting, J., dissenting).
223. *Id.* at 901.
224. Mu'min v. Virginia, 111 S. Ct. 242 (1990).
225. The majority opinion was joined by Justices White, O'Connor, Scalia, and Souter. Justice O'Connor also filed a separate concurring opinion. *Mu'min*, 111 S. Ct. at 1901.
226. *See supra* notes 147-81 and accompanying text.
227. *Mu'min*, 111 S. Ct. at 1903.
228. 158 U.S. 408 (1895).
229. 283 U.S. 308 (1931).
230. 451 U.S. 182 (1981).

the subject of racial bias and the possibility that potential jurors will have a disqualifying prejudice.[231] Although these decisions required an inquiry into racial bias, they were decided under the Supreme Court's supervisory power rather than on constitutional grounds.[232]

Justice Rehnquist then examined three racial bias cases tried in state courts[233] where the Supreme Court is limited to correcting constitutional violations.[234] The Court examined *Ham v. South Carolina*,[235] *Ristaino v. Ross*,[236] and *Turner v. Murray*.[237] Those cases held that in circumstances when racial prejudice presents an impermissible risk to a fair trial, the Constitution requires an inquiry into possible prejudice during the voir dire.[238]

The Court identified the two recurrent themes from these cases: an inquiry must be made into possible prejudice when it presents an unacceptable risk to a fair trial, and, regardless of the circumstances, the trial court has great latitude in conducting the voir dire.[239] After identifying the racial bias themes, Rehnquist examined cases in which pretrial publicity raised an issue of a trial's fairness.[240] Because Mu'min had relied so heavily on *Irvin v. Dowd*, the Court reviewed it carefully.[241] While concluding that *Irvin* was instructive, the majority distinguished it from *Mu'min* by noting that *Irvin* had stemmed from the denial of a change of venue motion rather than from the denial of the right to pose content questions during voir dire.[242] Furthermore, eight of the *Irvin* jurors had formed an opinion as to the petitioner's guilt, while no *Mu'min* jurors had professed forming a disqualifying opinion.[243] In addition, while conceding that the

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231. *Mu'min*, 111 S. Ct. at 1903-04.
232. *Id.* at 1904.
233. *Id.*
234. *Id.*
235. *See supra* notes 156-68 and accompanying text.
236. *See supra* notes 162-68 and accompanying text.
237. *See supra* notes 169-76 and accompanying text.
238. *Mu'min*, 111 S. Ct. at 1904.
239. *Id.*
240. *Id.* at 1906.
241. *Id.*
242. *Id.* at 1907.
243. *Id.*

level of publicity surrounding Mu'min's trial was substantial, the Court noted that it did not reach the level that it had in *Irvin*. Thus, there could be no presumption of community bias in *Mu'min*.[244] The majority also reviewed its holding in *Patton v. Yount*, that adverse pretrial publicity can create a presumption of partiality in the community, and decided that the substantial publicity in *Mu'min* did not reach the level necessary to disqualify the community.[245]

The Court also rejected Mu'min's reliance on the American Bar Association Standards for Criminal Justice.[246] These standards require that a juror be subject to challenge for cause regardless of his state of mind on impartiality once he admits exposure to inflammatory material or inadmissible evidence.[247] The Court held this to be a stricter standard than the Constitution requires.[248] The Court further supported its position by noting that content questioning during voir dire may have detrimental effects, such as cost and time consumption, as well as the possibility of tainting previously unexposed jurors with adverse pretrial information.[249]

The Court relied on the wide discretion given to the trial court in conducting voir dire in the area of pretrial publicity in upholding Mu'min's conviction.[250] In both the racial bias and the pretrial publicity cases, the Court has consistently emphasized the trial court's wide discretion in conducting the voir dire

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244. *Id.*

245. *Id.* at 1907.

246. *Id.* at 1907-08. Standard 8-3.5(a) requires:

> If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, . . . questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial . . . .

STANDARDS FOR CRIMINAL JUSTICE 8-3.5(a) (2d ed. 1980 & Supp. 1986).

247. *Mu'min* , 111 S. Ct. at 1907.

248. *Id.* Standard 8-3.5(b) reads in part:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the juror's testimony as to state of mind.

STANDARDS FOR CRIMINAL JUSTICE 8-3.5(b) (2d ed. 1980 & Supp. 1986).

249. *Mu'min*, 111 S. Ct. at 1905.

250. *Id.* at 1906.

and evaluating juror impartiality. The Court reasoned that because the trial judge sits in the locale where the publicity is centered, he is best able to evaluate the extent and impact of the pretrial publicity and to assess the jurors' impartiality.[251] This supports the deference to be afforded to the judge's determination.[252]

While acknowledging that content questioning during the voir dire would be helpful in assessing impartiality, the majority held that to be constitutionally mandated, the "trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."[253] The Court reasoned that although content questioning might be a better rule, it is not constitutionally required,[254] and thus, not mandated by the Supreme Court. In *Mu'min*, the majority held that the trial court's findings of impartiality comported with constitutional standards.[255]

In her concurring opinion, Justice O'Connor framed the issue as whether the trial court had erred in accepting the jurors' pronouncements of impartiality without first asking them content questions.[256] Justice O'Connor, agreeing with Rehnquist, believed that because the trial judge sits in the locale where the publicity is likely to be greatest, he is fully aware of its extent, nature, and effect, and his findings of impartiality are thus entitled to deference despite a lack of content questions.[257] Justice O'Connor held that content questioning is not indispensable in evaluating juror impartiality and therefore, is not required by the Sixth Amendment.[258]

2. *The Dissenting Opinions*

Justice Marshall began his forceful dissent by stating: "[t]oday's decision turns a critical constitutional guarantee — the Sixth Amendment's right to an impartial

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251. *Id.*
252. *Id.*
253. *Id.* at 1905.
254. *Id.* at 1908.
255. *Id.*
256. *Id.* at 1909 (O'Connor, J., concurring).
257. *Id.*
258. *Id.*

jury — into a hollow formality."[259] Marshall took particular exception to the majority's reasoning that the trial court had discharged its obligation to ensure impartiality by merely asking the jurors if they could be fair and impartial without first establishing the information to which they had been exposed.[260] Justice Marshall also criticized the majority's holding that a potential juror's evaluation of his own impartiality will suffice to qualify him as a juror.[261]

Justice Marshall recognized that no previous case had revealed the depth of voir dire necessary in instances of pretrial publicity. Thus *Mu'min* was a case of first impression,[262] and, in Marshall's view, the majority's justification that no previous pretrial publicity cases had required content questioning was irrelevant.[263]

Justice Marshall framed the issue as whether the court was obliged to ask the eight jurors who indicated media exposure to identify its content.[264] After examining the pretrial publicity and racial bias cases, he logically concluded that a "juror's 'own assurances that he is equal to the task cannot be dispositive of the accused's rights.' "[265]

Marshall's dissent explored the pretrial publicity cases and found that the right to a fair trial guarantees an accused the right to a jury that enters the jury box without any opinions or preconceptions about the case, and decides the case only on the evidence presented at trial.[266] Accordingly, satisfaction of this right requires that the trial court ask content questions during voir dire to prevent potential jurors with opinions or preconceptions from being seated.[267] "Anything less than this renders the defendant's right to an impartial jury meaningless."[268]

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259. *Id.* at 1909 (Marshall, J., dissenting). Justices Blackmun and Stevens joined all but part IV of Marshall's dissent. Justice Kennedy filed a separate dissenting opinion. *Id.* at 1901.

260. *Id.* at 1913.

261. *Id.*

262. *Id.* at 1912.

263. *Id.*

264. *Id.* at 1912.

265. *Id.* at 1913 (quoting Murphy v. Florida, 421 U.S. 794, 800 (1975)).

266. *Id.* at 1912.

267. *Id.* at 1913.

268. *Id.*

In addition, Justice Marshall recognized that because the petitioner bears the burden of showing juror partiality, the right to have content questions asked in order to elicit juror prejudice becomes even more crucial to protect the right to an impartial jury.[269] He believed that the right to a fair trial guarantees a defendant an opportunity to demonstrate bias,[270] and an adequate record goes a long way in providing this opportunity.

Justice Marshall then identified three reasons why content questioning during the voir dire is indispensable when potential jurors have indicated exposure to pretrial publicity.[271] First, questioning will determine if the type and extent of the publicity to which the juror was exposed would warrant his disqualification as a matter of law.[272] Prior decisions such as those in *Irvin*[273] and *Patton*[274] have held that substantial media coverage of inflammatory publicity may cause per se disqualification of a whole community.[275] In addition, Marshall had a different interpretation of *Irvin* than the majority.[276]

His interpretation stood for the proposition that anyone exposed to highly prejudicial and inflammatory pretrial publicity cannot fairly judge a case and should be per se disqualified.[277] Furthermore, if the information saturates the community, the community as a whole is presumed to have been exposed and is per se disqualified.[278] Therefore, when the community is exposed to prejudicial information, it should follow *a priori* that an individual juror actually exposed to the information should be per se disqualified.[279] If jurors are exposed to prejudicial publicity of the caliber existing in *Irvin* and *Rideau*, it may be that their professions of impartiality should not be believed.[280]

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269. *Id.*

270. *Id.* (relying on Dennis v. United States, 339 U.S. 162, 171-72 (1950)).

271. *Id.*

272. *Id.*

273. Irvin v. Dowd, 366 U.S. 717, 728 (1961).

274. Patton v. Yount, 467 U.S. 1025, 1032 (1984).

275. *Irvin*, 366 U.S. at 728; *Patton*, 467 U.S. at 1033.

276. *Mu'min*, 111 S. Ct. at 1913-14. *See supra* note 57 and accompanying text for majority's view of *Irvin*.

277. *Id.* at 1914.

278. *Id.*

279. *Id.*

280. *Id.*

Second, "content questioning . . . gives legal depth to the trial court's findings of impartiality."[281] A juror may be unaware or confused about his bias, because impartiality is a mixed question of law and fact. Its determination is not merely a factual one decided by the juror's assertion of impartiality, but also a legal one requiring the court's expertise in determining impartiality as a matter of law.[282]

The third reason for mandatory content questioning is to facilitate the trial court's fact finding, more specifically, to aid in its determination of juror credibility.[283] Content questioning aids not only a trial court's determination of impartiality, but appellate review as well.[284] Without an adequate factual background, the trial court's findings of juror impartiality should not be accorded deference at the appellate level.[285]

Justice Marshall believed that the nature and extent of publicity in *Mu'min* was highly prejudicial. Therefore, an inquiry into exactly what information a juror had received was essential.[286] Further, any juror hearing stories regarding Mu'min's confession would have been per se disqualified.[287]

Justice Marshall criticized Justice O'Connor's suggestion that content questioning is not necessary because the trial judge can put himself in the place of the juror to determine the extent and effect of the publicity.[288] In addition, he criticized the majority's claim that content questioning should be rejected because of the burden it may place on the judicial system.[289]

Justice Marshall concluded his dissent by stating: "the procedures undertaken in this case amounted to no more than the trial court going through the motions. I cannot accept that the defendant's Sixth Amendment right to an impartial jury means so little."[290]

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281. *Id.*
282. *Id.*
283. *Id.* at 1915.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 1915-16.
289. *Id.* at 1916.
290. *Id.* at 1917. Part IV of Justice Marshall's dissent was based on his belief that capital punishment is unconstitutional. *Id.*

In a separate dissent, Justice Kennedy[291] found that the publicity in *Mu'min*, unlike in *Irvin*, was not sufficiently widespread and prejudicial to cause per se disqualification of the whole community.[292] However, Justice Kennedy argued that this was not dispositive of an individual juror's impartiality.[293] Justice Kennedy viewed the issue as "one of historical fact: did the juror swear he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality be believed?"[294]

In Kennedy's view, once a juror has acknowledged exposure to pretrial publicity, the trial court has a duty to independently assess the juror's impartiality.[295] Although appellate courts should accord substantial deference to the trial court's finding of impartiality, such deference "rests on our expectation that the trial court will conduct a sufficient voir dire to determine the credibility of the juror professing to be impartial."[296] Justice Kennedy argued that the finding of impartiality in *Mu'min* was inadequately supported in the record and was therefore entitled to no deference.[297]

IV. Analysis

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a criminal defendant the right to a fair trial before an impartial tribunal.[298] This requirement assures that the accused will be convicted only by evidence developed at trial, and not by outside influences.[299] The failure to accord an accused a fair trial before an impartial, unbiased jury is a violation of the basic requirements of due process.[300] With regard to pretrial publicity, the guarantee is particularly

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291. *Id.* at 1917 (Kennedy, J., dissenting).
292. *Id.* at 1918.
293. *Id.*
294. *Id.* (quoting Patton v. Yount, 467 U.S. 1025, 1036 (1984)).
295. *Id.*
296. *Id.* at 1919.
297. *Id.*
298. *See supra* notes 11-13 and accompanying text.
299. Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (quoting Marshall v. United States, 360 U.S. 310, 312 (1959)).
300. *In re* Murchison, 349 U.S. 133, 136 (1955).

important. That adverse pretrial publicity may influence potential jurors is too obvious to question. Common human experience indicates that pretrial publicity may impair a defendant's right to a fair trial[301] because "[t]he prejudice to the defendant is almost certain to be as great when the evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. It may be even greater for it is then not tempered by protective procedures."[302]

In previous pretrial publicity cases, the Supreme Court has consistently recognized the significance of this growing problem.[303] In *Dennis v. United States*,[304] the Supreme Court upheld the conviction of a communist party leader who claimed his trial was unfair because government employees served as jurors.[305] The Court, while extending the trial court great discretion in conducting the voir dire, cautioned that the trial court has a "serious duty" to determine if juror bias exists.[306] The *Dennis* Court then stated that "[i]n exercising its discretion, the trial court must be zealous to protect the rights of an accused."[307] It is apparent that the trial court in *Mu'min* lacked zeal in protecting Mu'min's right to a fair trial required by *Dennis*, and that it failed to heed the Supreme Court's stern warning in *Sheppard* that trial courts must take "strong measures" to insure a fair trial.[308]

To carry its burden of ensuring a fair trial, a trial court is obliged to screen out jurors with a disqualifying state of mind. A searching voir dire is one technique through which a trial court can fulfill that obligation.[309] Previous Supreme Court decisions have made it clear that jurors need not be totally ignorant of the facts of a case.[310] In fact, potential jurors who do not keep abreast of current events may be unsuitable.[311] However, the

301. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563.
302. Marshall v. United States, 360 U.S. 310, 312-13 (1959) (citations omitted).
303. *See supra* discussion accompanying parts II.A & II.B.
304. 339 U.S. 162 (1950).
305. *Id.* at 172.
306. *Id.* at 168.
307. *Id.*
308. *See supra* note 119 and accompanying text.
309. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976).
310. Irvin v. Dowd, 366 U.S. 717, 722 (1961).
311. Mark R. Stabile, Comment, *Free Press-Fair Trial: Can They be Reconciled in*

possibility that jurors have been exposed to highly prejudicial information, the nature of which mandates per se disqualification, cannot be overlooked by the trial court.[312]

The Marshall dissent in *Mu'min* correctly interprets *Irvin* as standing for the proposition that anyone exposed to highly inflammatory pretrial publicity should not be seated as a juror solely because he claims to be impartial.[313] Although the level of publicity in *Mu'min* may not have reached the level it did in *Irvin* so as to disqualify the whole community, it was arguably sufficiently inflammatory to disqualify anyone actually exposed.[314]

In *Rideau*, it was the nature of the publicity that warranted community disqualification.[315] In *Rideau*, the whole community was presumed to have been exposed to the defendant's confession, and was thus disqualified.[316] It would follow logically that an individual exposed to information akin to that in *Rideau* would also be per se disqualified. This is precisely the case in *Mu'min* with respect to jurors who had read or heard about Mu'min's confession. The trial court, therefore, had a duty to determine which potential jurors had read about the confession and to excuse them from service. In addition, jurors in *Mu'min* may have been exposed to other highly prejudicial information that would justify disqualification. The trial court failed to protect Mu'min from the prejudice caused by the inflammatory information.

The racial bias cases relied on by both the majority and dissent support the view that a probing voir dire is necessary when a strong likelihood of prejudice exists.[317] In cases where the threat of racial prejudice represents an impermissible risk to a fair trial, refusal to allow questioning on the subject of racial bias violates the essential fairness requirement of the Fourteenth Amendment.[318] In *Mu'min*, it was acknowledged that

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a Publicized Criminal Case?, 79 GEO. L.J. 337,344 (1963).

312. Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

313. *Mu'min*, 111 S. Ct. at 1914 (Marshall, J., dissenting).

314. *Id.*

315. *See supra* notes 63-71 and accompanying text.

316. *Rideau*, 373 U.S. 723 (1963).

317. *See e.g.*, Ristaino v. Ross, 424 U.S. 589, 595 (1976).

318. *See*, Ham v. South Carolina, 409 U.S. 524, 529 (1973); *Ristaino*, 424 U.S. 595.

there was substantial pretrial publicity, much of which was prejudicial and inflammatory.[319] Despite this, the majority refused to recognize that a substantial risk to Mu'min's right to a fair trial existed, and therefore, failed to require an inquiry into possible prejudice.[320] Instead, it relied on a juror's assurance of his own impartiality.[321] Although the publicity surrounding the trial alone should have mandated content questioning, the fact that *Mu'min* was a capital trial made such questioning imperative. The Supreme Court, in *Turner v. Murray*,[322] had already ruled that a capital trial is a special circumstance mandating additional steps to protect the accused from the effects of prejudice.[323]

Although the *Mu'min* majority claims to have relied on cases like *Turner*, it failed to recognize that the pretrial publicity in *Mu'min* presented a serious risk to a fair trial. It also failed to follow the teaching of those cases by failing to require procedures designed to mitigate the effects of the publicity.

Additionally, the *Mu'min* Court erred in crediting the jurors' assurances of impartiality.[324] Once jurors are exposed to highly prejudicial publicity, their assurances of impartiality should not control.[325] Although the *Irvin* Court acknowledged that jurors need not be totally ignorant of the facts surrounding a case, it held that situations do exist in which the jurors' assurances should be given no weight in determining impartiality.[326] Jurors may be unaware of their own bias,[327] mistaken or confused about the actual meaning of impartiality,[328] or confused by courtroom language.[329] Therefore, jurors are incapable of evaluating their own impartiality.[330]

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319. *Mu'min*, 111 S. Ct. at 1907.

320. *Id.*

321. *Id.* at 1908.

322. 476 U.S. 28 (1986).

323. *Id.* at 33.

324. *Mu'min*, 111 S. Ct. at 1908.

325. *E.g.*, Irvin v. Dowd, 366 U.S. 717 (1961).

326. *Id.* at 728. In addition, the Supreme Court in Murphy v. Florida held that jurors' assurances of impartiality can not be dispositive of the issue. Murphy v. Florida, 421 U.S. 794, 800 (1975).

327. *Mu'min*, 111 S. Ct. at 1914 (Marshall, J., dissenting).

328. *Id.*

329. *Id.*

330. Brief for the National Jury Project, Amicus Curiae at 5, Mu'min v. Virginia,

Second, the circumstances in which the voir dire is conducted affect juror responses because most people seek to present themselves in a favorable light.[331] The Supreme Court in *Irvin* stated: "[n]o doubt each juror was sincere when he said that he would be fair and impartial to the petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."[332] By conducting voir dire in which large panels of jurors are examined simultaneously, a juror may seek either consciously or subconsciously to present himself as fair and impartial.[333]

Third, the Court in *Irvin* held that impartiality is a "mixed question of law and fact."[334] Because jurors are lay people, they cannot evaluate their own impartiality as a matter of law. The trial court must make an independent legal finding of the juror's impartiality based on his responses during the voir dire.[335]

In evaluating juror impartiality, the trial court is given great discretion and substantial deference by appellate courts. However, this deference is based on the belief that a sufficient voir dire has been conducted.[336] If the trial court conducts only a cursory voir dire, its findings of impartiality should be entitled to little deference. In *Rosales-Lopez v. United States*,[337] the Supreme Court stated that "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled."[338] The Court has held that in the exercise of its discretion, the trial court must be zealous in protecting the accused's rights.[339] In *Mu'min*, the procedures employed by the trial court fell far short of zealously pro-

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111 S. Ct. 1899 (1991) (No. 90-5193).

331. *Id.* at 13 (citing John L. Carroll, *Speaking the Truth: Voir Dire in a Capital Case*, 3 AM. J. TRIAL ADVOC. 199 (1979).

332. *Irvin*, 366 U.S. at 728.

333. Brief for Nat'l Jury Project, *supra* note 322, at 13.

334. *Irvin*, 366 U.S. at 723.

335. *Id.*

336. *Mu'min*, 111 S. Ct. at 1919 (Kennedy, J., dissenting).

337. 451 U.S. 182 (1981). In *Rosales-Lopez*, the Supreme Court upheld the conviction of a Mexican petitioner for his part in a plan to smuggle illegal aliens into the United States. The petitioner claimed the trial court's failure to ask questions about biases towards Mexicans during the voir dire deprived him of a fair trial. *Id.* at 187.

338. *Id.* at 188.

339. Dennis v. United States, 339 U.S. 162, 168 (1950).

tecting Mu'min's right to an impartial jury.[340]

The use of content questioning during the voir dire is a procedural device by which the trial court can fulfill its obligation to provide a fair trial by accurately detecting and eliminating disqualifying prejudices from the jury. Its use was recommended by the Supreme Court in both *Sheppard*[341] and *Nebraska Press*.[342] Furthermore, the American Bar Association Standards for Criminal Justice recommend content questioning whenever a potential juror has indicated exposure to pretrial publicity.[343] Additionally, many federal circuits have mandated content questioning in circumstances similar to those in *Mu'min*.[344] Because a substantial threat existed that pretrial publicity would jeopardize Mu'min's right to a fair trial, the Supreme Court erred in affirming his conviction. The trial court refused to ask proposed content questions, and instead merely accepted juror assurances of impartiality. "[T]he measures a judge takes or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant receives a fair trial consistent with the requirements of due process."[345]

Perhaps the most compelling reason for mandatory content questioning is that an accused seeking reversal of a conviction has an affirmative burden of demonstrating actual jury bias.[346] The Supreme Court holds Mu'min to a seemingly impossible standard. It requires him to demonstrate that his jury was biased, but fails to guarantee him the procedural device necessary to meet that burden. Such reasoning is antithetical to previous Court decisions which have held that the right to a fair trial guarantees the accused the opportunity to demonstrate any unfairness at his trial.[347] In *Dennis v. United States*, the Court

340. *Mu'min*, 111 S. Ct. at 1917 (Marshall, J., dissenting).

341. *See supra* notes 116-18 and accompanying text.

342. *See supra* note 132 and accompanying text.

343. *See supra* notes 237-38 and accompanying text.

344. *See, e.g.*, United States v. Davis, 583 F.2d 190 (5th Cir. 1978); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968).

345. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976).

346. *E.g.*, Irvin v. Dowd, 366 U.S. 717, 723 (1961).

347. *E.g.*, Groppi v. Wisconsin, 400 U.S. 505 (1971). In *Groppi*, the Supreme Court invalidated a statute that prohibited a change of venue in misdemeanor cases, no matter what the circumstances. The Court stated: "under the Constitution, a defendant must be given an opportunity to show that a change of venue is required in his case." *Id.* at 511.

stated: "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."[348] Similarly, in *Murphy v. Florida*, the Court stated, "it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of a juror as will raise the presumption of partiality.' "[349]

If the accused is not guaranteed the right to content questioning during the voir dire, he will be unable to demonstrate the existence of actual jury bias. Content questioning enables an accused to demonstrate bias by allowing him to challenge for cause effectively and by facilitating his effective use of peremptory challenges. In addition, content questioning provides a detailed record of the trial court's findings of impartiality for appellate review.

The opportunity to challenge jurors for cause is perhaps an accused's strongest weapon in eliminating biased jurors. The right to challenge for cause has little meaning if unaccompanied by the right to ask questions designed to elicit the bias.[350] Without content questioning it will be difficult to expose any bias caused by adverse pretrial publicity. The failure to provide an adequate opportunity to challenge for cause may itself be a constitutional violation.[351] The American Bar Association Standards for Criminal Justice provide that counsel should be given great latitude in questioning jurors on potential biases in order to facilitate the use of challenges for cause.[352] By denying the request for content questions, the trial court in *Mu'min* failed to provide Mu'min an opportunity to make fully informed challenges for cause.

Failure to allow content questions also impairs the accused's use of peremptory challenges.[353] Although their use is not a constitutional right, where mandated by statute, the accused should be afforded liberal opportunity to question about the existence

348. Dennis v. United States, 339 U.S. 162, 171-72 (1950).

349. Murphy v. Florida, 421 U.S. 794, 800 (1975) (quoting *Irvin*, 366 U.S. at 723).

350. Ham v. South Carolina, 409 U.S. 524, 532 (1973)(Marshall, J., concurring in part).

351. Davis v. Florida, 473 U.S. 913, 914 (1985) (Marshall, J., dissenting from the denial of a Writ of Certiorari).

352. STANDARDS FOR CRIMINAL JUSTICE 15-2.4 (2d ed. 1980 & Supp. 1986).

353. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

of prejudices so that peremptory challenges can be exercised effectively.[354]

In addition, content questioning enables an accused to exercise his right to preserve a record for appeal.[355] If an accused's demonstration of juror bias is rejected by the trial court, the accused will then have a full and fair opportunity to demonstrate the existence of an unfair trial at the appellate level.

To summarize, the Supreme Court has consistently held that "the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial."[356] In the case of pretrial publicity, the appropriate safeguard of a fair trial is the accused's right to demonstrate that pretrial publicity compromised the impartiality of the jury and the fairness of the trial.[357] In *Mu'min*, the petitioner was not afforded an opportunity to ask content questions and was thus unable to meet the burden of showing actual bias. Although Mu'min did not demonstrate any bias within the jury that convicted him, the inadequate procedures employed by the trial court created such a risk that pretrial publicity may have influenced the jurors, that Mu'min was denied his due process rights.[358]

V. Conclusion

The Supreme Court's decision in *Mu'min v. Virginia* deviated from prior decisions in which the Court espoused a theory of affirmative action in protecting an accused from the effects of pretrial publicity.[359] Despite the Court's prior mandate that trial courts be zealous in protecting an accused's rights, the *Mu'min* Court affirmed a conviction when the trial court, despite the real possibility of prejudice, had refused to employ even the minimally intrusive procedure[360] of content questioning during the voir dire.

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354. STANDARDS FOR CRIMINAL JUSTICE 15-2.4 (2d ed. 1980 & Supp. 1986).

355. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 727 (1961).

356. *See, e.g.*, Ham v. South Carolina, 409 U.S. 524, 532 (1973) (Marshall, J., concurring).

357. Chandler v. Florida, 449 U.S. 560, 575 (1981).

358. *See* Estes v. Texas, 381 U.S. 532, 542 (1965).

359. *E.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966).

360. Turner v. Murray, 476 U.S. 28, 37 (1986).

What is particularly troublesome about this decision is that the Court holds defendants such as Mu'min to a seemingly impossible standard. The Court requires them to show actual juror prejudice when seeking a retrial, but fails to guarantee them the benefit of using a procedure designed to meet that burden. Without the guaranteed ability to use content questioning, effective use of the voir dire in high profile cases becomes subject to judicial discretion. Thus, the guarantee of a fair trial hinges on the discretion of the trial judge. This decision does indeed turn a defendant's constitutional right to a fair trial into a "hollow formality"[361] subject to the whim of the trial judge.

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361. Mu'min v. Virginia, 111 S. Ct. 1899, 1909 (1991) (Marshall, J., dissenting).

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